



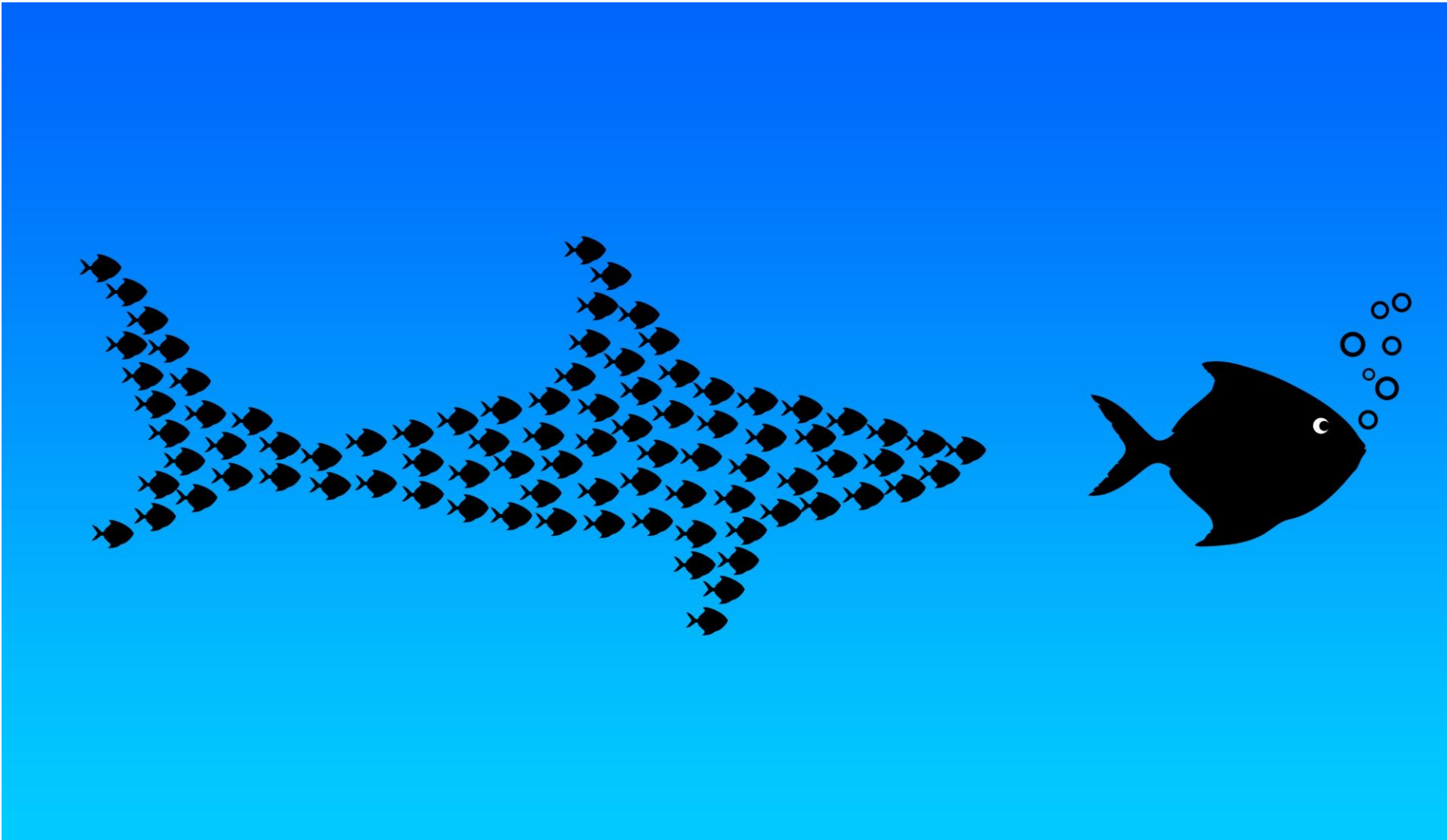
Scopelitis

Garvin Light Hanson & Feary

The Transportation Law Firm

2024 Class Action Workshop

Introduction



TRIAL, SETTLEMENT, AND CASE PREPARATION

What now



Early Case Assessment:
Claims and
Defenses

What are the claims?
What are the defenses?

- Contracts?
- Arbitration Agreements?
- Handbooks?
- Prior settlements?
- Other documents?

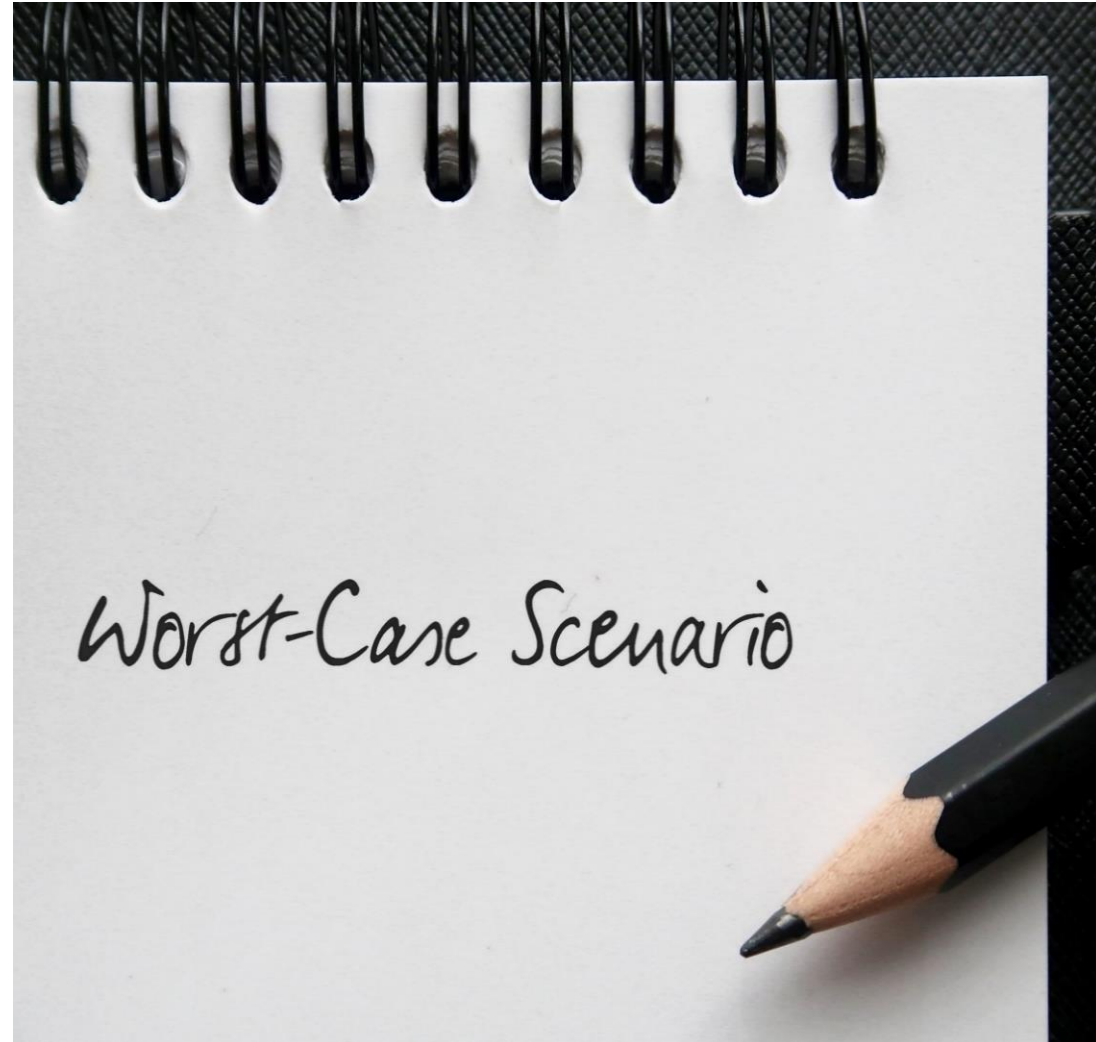
ALLEGATION

Witnesses and Operational Facts



Exposure

- Class members
- Settlement statements/wage statements
- Expenses
- Systems housing the information





Litigation vs.
early-settlement



~~CONFLICT~~
MEDIATION





HOW MUCH?

PAY PLANS AND MINIMUM WAGE COMPLIANCE

FLSA

Fair Labor Standards Act



Drivers are told pay is by the mile What does that mean?

- A. Actual or hub miles driven
- B. As defined by the motor carrier
- C. Covers all work performed, regardless of what it is (e.g., trip planning, driving, loading and unloading, waiting to load or unload, fueling, paperwork, etc.)
- D. Miles billed to the customer

WEEKLY TIME SHEET

	Time In	Time Out	Hours	Ove
Monday	9:00 AM	7:00 PM	10	
day	9:00 AM	5:00 PM	8	
	9:00 AM	5:00 PM	8	
		6:00 PM	9	
		10 PM	8	



Best Practices

- Compensation policy
- Hours-of-service policy
- Audit compliance

California Piece Rate Issue

- Key - Compensate drivers for all time worked.
- Be sure to address all “non-productive” time:

Paperwork	Fueling	Training	Cleaning
Trip Planning	Waiting to Load/Unload		Scaling
Pre-Trip and Post-Trip Inspections		Receiving Dispatch Instructions	

- Mileage rate determines the amount to be paid, it does not define the work for which the driver is paid
- Can pay additional accessorial pay

California Piece Rate Issue

- Require “clock-in” by logging into the ELD to record the start of the workday before beginning any work and to “clock-out” by logging off-duty
- Allows Company to rely upon the driver’s DOT hours of service to determine hours worked for the wages earned each pay period
- All on-duty time driving and on-duty not driving time is considered time worked, and drivers are to accurately record all their work time as on-duty driving and on-duty not driving
- Breaks of 20 minutes or less must be logged as on-duty not driving. During these short breaks of less than 20 minutes, the driver relieved of all duty and responsibility for the load and the equipment once they have parked the truck in a safe place and locked the cab of the truck
- When drivers log off-duty (whether inside or outside the sleeper berth), they are relieved of all duty and responsibility for the load and the equipment

Washington State Requires Overtime Pay

- Washington does not exempt truck drivers from overtime
- If employer pays on a piece-rate basis, piece rate must include “reasonable equivalent of overtime”
- Overtime pay must be included within the base pay
- Statute provides guidance on creating compliant pay plan
- Only applies to “Washington based drivers”

State Law Pitfalls

- Different overtime exemptions
- Wage statement laws
- New York “Spread of Hours”



California Wage Statement Law

- Non-compliant Wage Statement can provide a clear path to certification
- What must be included in a compliant wage statement:
 - Dates
 - Gross Pay
 - Total Hours
 - Hourly Rates
 - If the employee is paid on a piece-rate basis, the wage statement must have the number of piece-rate units earned and any applicable piece rate
 - Piece-rate employees are entitled to be paid at least minimum wage for the following activities: rest and recovery periods and nonproductive time
 - Importantly, this compensation must be given to piece-rate employees in addition to their compensation for piece-rate activities
 - Deductions
 - Itemized deductions commonly include Federal income taxes; State and local income taxes; FICA taxes, including those for both Social Security and Medicare; State disability insurance; Health insurance; and retirement contributions

California Wage Statement Law

- What must be included in a compliant wage statement:
 - Net Pay
 - Personal Information
 - Employer's Information
 - Balance of Paid Sick Time
 - Of note, California's paid sick leave law now does require the employer to list the available balance of paid sick leave (or PTO, if used in place of a separate sick leave bank) on employees' itemized payment statements or other separate written statements issued to employees alongside with each wage statement on an employee's pay date
 - If the employer allows unlimited sick leave or PTO, an employer may list "unlimited" as the balance. While the number of available hours must be listed, an employer does not have to calculate the monetary value of the available paid leave at that time
- Vacation Pay
 - Although California does not require listing the balance of available vacation hours on an employee's pay statement, the final wage statement must have the monetary value of an employee's accrued vacation

Defending Expense Indemnity Claims in California

- In misclassification cases, Plaintiffs claim *all compensation* are wages
- Look to the contract for evidence that parties agreed compensation would cover labor and equipment
- In the absence of an agreement to the contrary, California law only requires payment at the minimum wage for all hours worked and indemnification for expenses incurred

Defending Expense Indemnity Claims in California

- Deduct all expenses incurred from total compensation
- Divide whatever compensation remains by the total hours worked to determine compliance with minimum wage for each hour
- What time period?
- Week?
- Trip?

5-MINUTE BREAK

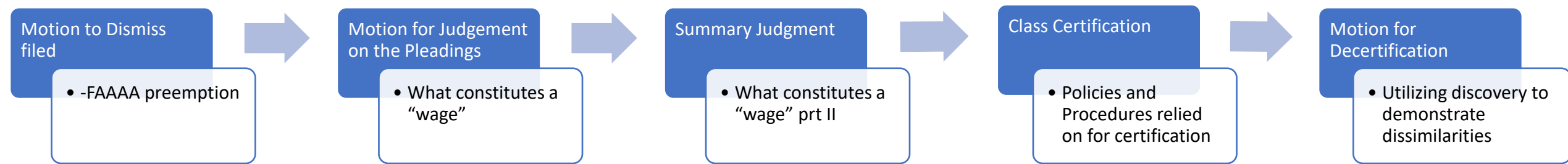
STATE WAGE DEDUCTION LAWS, REIMBURSEMENT STATUTES, AND PIECE RATE COMPENSATION

Case Study: What constitutes an impermissible deduction from a “wage”?

- **Complaint:** Motor carrier owner claims broker misclassified him under the New York State Commercial Goods Transportation Industry Fair Play Act, N.Y. Lab. Law § 862-b. Seeks recovery of all deductions taken from settlement statements
- **Claim:** Broker’s deductions from motor carrier’s settlement statement violated New York Labor Law § 193’s prohibition on “any deductions from the wages of an employee”
- **Issue:** Do payments to motor carrier constitute “wages,” defined in the New York Labor Law as “earnings of an employee for labor or services rendered” [NYLL 190(I)]



Presenting the wage deduction argument - litigation timeline



Motion to Dismiss on FAAAA preemption grounds

Issue presented: Whether the Fair Play Act impermissibly regulates motor carrier services in violation of the FAAAA's express preemption of state laws "related to a price, route or service of any motor carrier [or] broker with respect to the transportation of property"

Argument: Fair Play Act is specifically directed at how motor carriers and brokers provide services

- Stated purpose is to "ensure the proper classification of employees in the trucking industry"
- Statute explicitly references motor carrier and broker services 14 times

Court denies Motion: Holding the Fair Play Act does not directly regulate motor carrier or broker services given the law's real targets are individual's performing the transportation services, and not the services themselves

Motion for Judgment on the Pleadings: what constitutes a “wage”?

- **Issue Presented:** Do Plaintiffs have a contractual right to assert N.Y. Lab. Law § 193 claim
- **Argument:**
 - Predicate to wage recovery under the New York Labor Law is an “enforceable contractual right to those wages.” *Tierney*, 189 A.D.2d at 632
 - The only contracts for payments are between Plaintiffs’ respective business entities and the motor carrier. Neither Plaintiff is a party to the Agreements. Rather, their business entities are and, accordingly, they have no standing to assert Section 193 claims
- **Court Order:**
 - Denying request for Section 193 claim dismissal, reasoning that cases requiring contract involve claims for compensation outside of the traditional meaning of “wages,” such as bonuses or other incentive compensation
 - NYLL does not require an enforceable contractual right where “straight wages are at issue”

Class Certification Granted & Summary Judgement Denied

Plaintiff's class certification narrative: "Common policies" capable of proving employment relationship

Contract between defendant and each proposed class member

"Written policies" of defendant

Defendant and customer contracts



Court's holding on Class Certification: Court adopts view that policies and procedures identified by plaintiff are sufficient to make employment determination on class basis



Court punts on Summary Judgment: Defendant put "cart before horse" trying to resolve wage issue before employment determination



Summary Judgment Briefing

- **Issue presented:** Motion asked the Court to find that broker's payments of more than \$500,000 and \$3,000,000 to Plaintiffs' respective businesses are not "wages" under the New York Labor Law
- **Applicable Law:**
 - "Wages" are the "earnings of an employee for labor or services rendered" [NYLL 190(l)]
 - To qualify as a wage, a "direct relationship between an employee's own performance and the compensation" must exist
- **Argument**
 - Revenue plaintiffs' respective businesses received emanated from labor/services provided by the ten or more individuals each of the businesses employed to operate numerous trucks
 - Neither Plaintiff worked full-time performing deliveries, nor was his personal labor a prerequisite for his company's receipt of payment
 - Payment untethered to Plaintiffs' own performance or that compensates for something other than labor falls outside definition of "wages"

Court Decertifies Class

- No common proof of wages—court, finally, confronts reality that motor carrier owners did not compensate themselves based on the services they personally rendered



Other wage deduction/reimbursement developments

New Jersey and the FLSA



The Illinois Wage Payment and Collection Act (IWPCA)

- Illinois' take on the ABC Test - still puts the burden on the alleged employer to prove each prong is met, BUT
 - A: Control and direction determined by considering 25 factors under 56 Ill. Adm. Code § 2732.200(g)
 - B: Met if the IC performs works which is *either* outside the usual course of business *or* outside all of the places of business of the alleged employer
 - C: 13 factors guide whether individual engaged in an “independently established” business

Deductions and the IWPCA

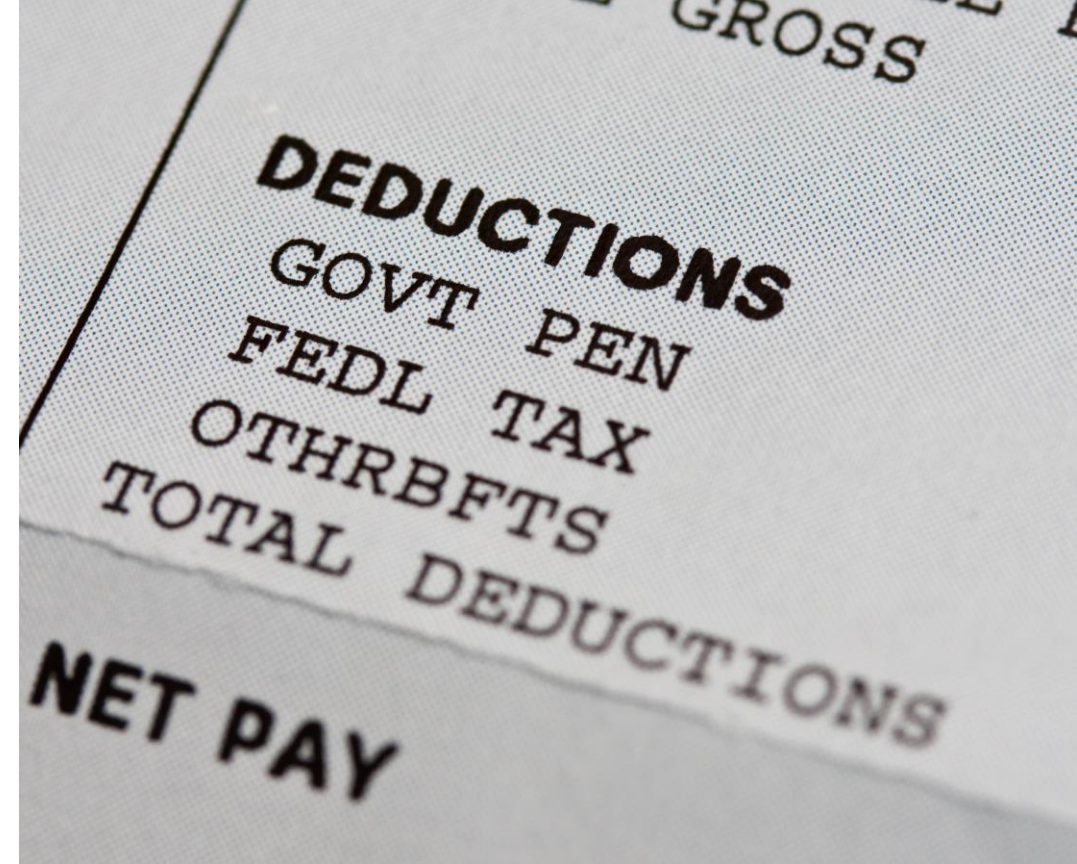
The IWPCA applies to prohibit certain deductions from “wages”

Wages = “any compensation owed...*pursuant to an employment contract or agreement between the parties.*” 820 ILCS § 115/2

The statute only “enforces the terms of an existing contract or agreement”

→ Plaintiffs cannot use the IWPCA “to rewrite the terms of their agreement”

Threshold question: Is there an agreement to pay “wages”?



Deductions and the IWPCA - What is allowed?

- Certain deductions allowed if they are:
 - 1) for the benefit of the employee; or
 - 2) made with the express written consent of the employee, given freely at the time deductions are made
- Recent IDOL regulations: “No agreements for a defined duration of time shall last longer than six months”

Deductions and the IWPCA: Key takeaways

- The written agreement matters; review regularly to ensure compliance
- Ensure all deductions are:
 - Specifically laid out and identifiable;
 - Easily calculable; and
 - Consistent enough to qualify as a recurring deduction

Reimbursement of expenses and the IWPCA

- Must reimburse for all expenses that are:
 - Required by the employer in discharge of duties, or
 - “inure to the primary benefit of the employer”
- But:
 - Employee must submit expense with “appropriate supporting documentation” within 30 days of incurring expense (unless reimbursement policy allows for additional time)
 - No reimbursement required if the employee fails to comply with written policy

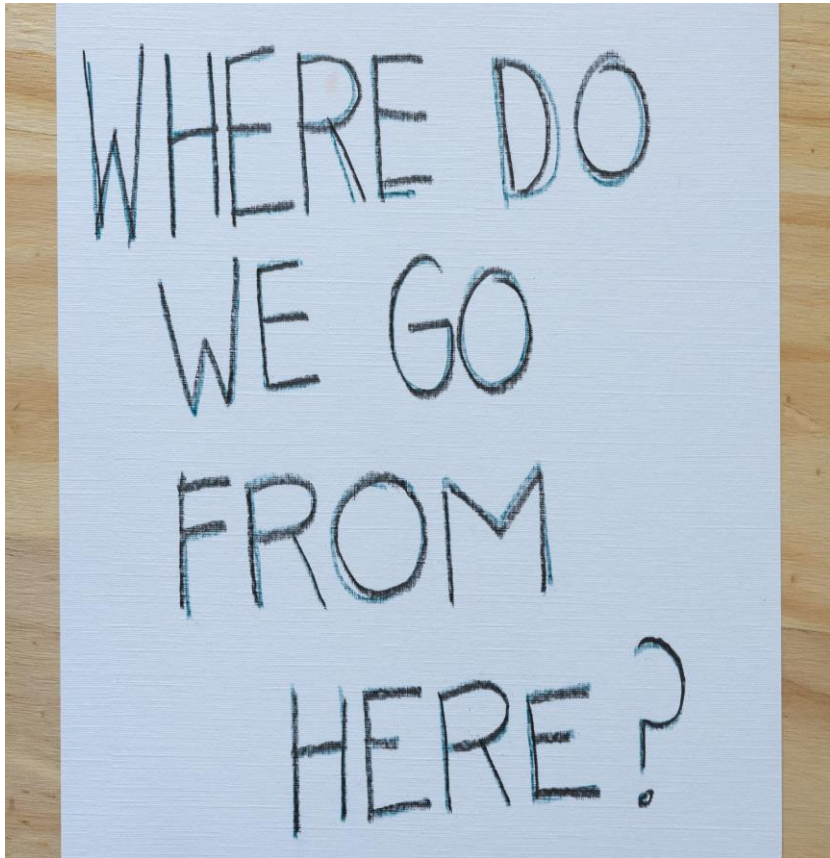
Reimbursing expenses and the IWPCA: Regulatory “Guidance”

- Relatively recent IDOL Regulations (effective Mar. 31, 2023) identify 5 factors impacting whether expense is “to the primary benefit of the employer”:
 - 1) Is there an expectation of reimbursement?
 - 2) Is the expense required to perform duties?
 - 3) Is the employer receiving a value that it would otherwise need to pay for?
 - 4) How long the employer is receiving the benefit.
 - 5) Is the expense is required of the job?
- The takeaway: Does the expense benefit the employer and its business model?

IWPCA expense reimbursement: Other developments

- Final pay: Any unreimbursed expenses must be included in final compensation at end of employment
- Recordkeeping - Must keep the following for 3 years:
 - *Reimbursement policies*
 - *Requests for reimbursement and documentation showing approval or denial*
 - *Documentation showing actual reimbursement*
- If an employer “allows for reimbursement of amounts that exceed those specified in its written policy, the employer shall be liable for full reimbursement of such expenses.”
- Statutory Damages: Unpaid amounts + [5% of amounts owed x # of months that elapse until order paid]

IWPCA expense reimbursement: Key takeaways



- Ensure a written expense reimbursement policy is in place and communicated to employee drivers
- Review recordkeeping requirements to ensure compliance
- Create a paper trail for all reimbursements

Meal and Rest Breaks in Washington

- Washington meal and rest break requirements largely track California requirements
- FMCSA preempted Washington's meal and rest break requirements for drivers subject to DOT HOS
- FMCSA invited, and Washington submitted, request for waiver of preemption determination

Meal and Rest Breaks in California

- In December of 2018, the FMCSA issued an order preempting California's meal and rest break rules as applied to property-carrying commercial motor vehicle contractors who are subject to the FMCSA's hours of service regulations. *Order Granting Petition for Determination of Preemption*, 83 Fed. Reg. 67470 (Dec. 28, 2018)
- On January 15, 2021, the Ninth Circuit issued an opinion in *Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (2021), upholding the FMCSA's determination that California's meal and rest break rules are preempted under 49 U.S.C. § 31141
- This preemption applies retroactively to all pending administrative and judicial actions. *Valiente v. Swift Transp. Co. of Ariz.*, 54 F.4th 581 (9th Cir. 2022) ("Congress and the FMCSA have spoken with a clear voice in prohibiting enforcement of California's MRB rules. Allowing Plaintiffs to move forward with their claims would require this Court to act in opposition to that decree.")
- Of course, note too that the FMCSA is currently considering waivers to the original preemption decision which may re-ignite the obligation for employers to provide meal breaks and rest breaks

Meal and Rest Breaks in California

- California has strict rules on piece-rate payments; it does not permit wage-averaging (unlike the FLSA) and requires separate pay for all worked. Specifically, under Cal. Lab. Code § 226.2, employers must pay compensation for “non-productive” time separately from piece-rate compensation. Employers must also pay for rest breaks separately
- Motor carriers should continue paying employee drivers for rest breaks in California at their “regular rate” of pay, even if those drivers are subject to the federal hours-of-service regulations and therefore exempt from the Wage Order’s meal and rest break requirements under the FMCSA preemption decision
 - FMCSA preemption decision only preempts the rules governing meal and rest breaks that are contained in the Wage Order
 - Because the obligation to pay the “regular rate” “separately” for rest breaks is found in Section 226.2, employers may still be on the hook for those payments

PAGA, ARBITRATION, CLASS WAIVERS, AND EXTRATERRITORIALITY

Extraterritoriality

- Application of state wage and hour laws beyond a state's borders
- Often a fact-sensitive analysis that considers the location of residence, hire, dispatch, control, compensation, where work is principally completed, etc.
- Why does it matter?



5-MINUTE BREAK

And you get a PAGA lawsuit,
and you get a PAGA lawsuit . . .

- PAGA - Only Lawsuits
- PAGA - Mostly Lawyers
- PAGA - Messy Trials

But is PAGA relief in sight?



California Courts haven't trimmed PAGA - Will California voters?

Force PAGA claims to arbitration?

Unmanageable PAGA claims dismissed?

Replace PAGA altogether?

To be determined in November 2024

relation of from a
point of view.

Arbitration

hearing of a dispute
impartial referee
settle disputes

Costs/Benefits of Arbitration

- Private and Confidential
- Can be individual in nature
- Arbitration fees
- Potential for mass arbitration
- Limited appellate review



Waiver

A formal statement in which someone gives up a right or privilege

Federal Arbitration Act VS. State Arbitration Acts

- Presumption in favor of arbitrability
- Preemption of unfavorable state law
- Class waiver enforcement under state law

F A A

Financial Considerations



- Cost of claims
- Case management fees
- Arbitrator's fees
- Final resolution?
- Beware of a hostage situation
- Beware of mass arbitration

FLSA COLLECTIVE ACTION ISSUES

Difference between a Rule 23 class action and FLSA collective action

- **Class action:** Opt-out, statute of limitations tolled for absent class members, class certification process, and state law claims
- **Collective action:** Opt-in, statute of limitations continue to run until individual joins lawsuit, “conditional certification”, and FLSA claims

FLSA Collective Action Developments

- *Clark v. A&L Homecare and Training Center*, 68 F.4th 1003 (6th Cir. 2023)
- *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021)



Motor Carrier Act Exemption: Framing the issue



I. INTRODUCTION

This Motion presents a jurisdictional question for the Court: if Plaintiffs are subject to the Federal Motor Carrier Safety Administration’s jurisdiction, they are exempt from the Fair Labor Standards Act along with Wisconsin overtime laws. 29 U.S.C. § 213(b)(1) (“Motor Carrier Act Exemption”); Wis. Admin. Code DWD § 274.04(4).¹ The FMCSA’s jurisdiction extends to commercial motor vehicle drivers who (1) transport product moving in interstate commerce for a motor carrier, or (2) are part of a class of drivers with a reasonable expectation of doing so. *Secretary of Transportation Notice of Interpretation*, 46 Fed. Reg. 37902-02, 1981 WL 115508 (July 23, 1981). Plaintiffs both transported product moving through interstate commerce for motor-carrier CTS, and had a reasonable expectation of doing so given the interstate nature of CTS’s operation. In turn, they were subject to the FMCSA’s jurisdiction—and therefore subject to the Motor Carrier Act Exemption—while employed by CTS, and in turn entry of summary judgment in CTS’s favor on both the FLSA and Wisconsin overtime claims is required. *Am. Compl.* ¶¶ 38, 42, 44; *Answer to Am. Compl., Affirm. Defenses* ¶ 1.

Motor Carrier Act Exemption: Competing Narratives

Plaintiff's theme



Defendant's theme



Seventh Circuit Decision on Motor Carrier Act Exemption

“This carveout is known as the ‘MCA exemption,’ and its rationale is safety. It is dangerous for drivers to spend too many hours behind the wheel, and ‘a requirement of pay that is higher for overtime service than for regular service tends to...encourage employees to seek’ overtime work. *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 657 (1947).”

“White Collar” Exemptions

- Executive Exemption
- Administrative Exemption
- Professional Exemption
- State Law Considerations



Compensability of Sleeper Berth Time



Mix of cases regarding the compensability of sleeper berth time under the FLSA

24 hours a day or at least 16 hours if they can sleep while out on the road

Responsibility for the equipment and load

5 MINUTE
BREAK

LEASING REGULATION COMPLIANCE

Federal Leasing Regulations

- Key Issues:
 - Compensation
 - Deductions
 - Forced Purchase
 - Escrow Accounts
 - Equipment Lease Agreement compliance with Regulations



Recent Decisions

- ***Rivers v. Southway Carriers, Inc.***, 2024 WL 579734 (N.D. Ill. Feb. 13, 2024) (granting class certification on Leasing Regulations claim and FLSA certification of minimum wage claim)
- ***Hill v. Cargo Runner Co.***, 2023 WL 6213674 (N.D. Ill. Sept. 25, 2023) (denying, in part, motion to dismiss Leasing Regulation claims)
- ***Roberts v. TransAm Trucking, Inc.***, 2023 WL 6376756 (D. Kan. Sept. 29, 2023) (granting/denying summary judgment on Leasing Regulation claims)



EMERGING ISSUES



Business Opportunity Act Claims

- Nearly half of the states regulate how Business Opportunities are offered
- “Driving opportunity”
- May open door to different - and significant - damages

Consumer Protection, Deceptive Practices, and False Claims Act

- Liberal definitions of “consumer”
- Driver Recruitment and Driving School Programs targeted
- “False” Unemployment Tax Reporting
- Uncertainty = \$ettlement



Fraud Claims

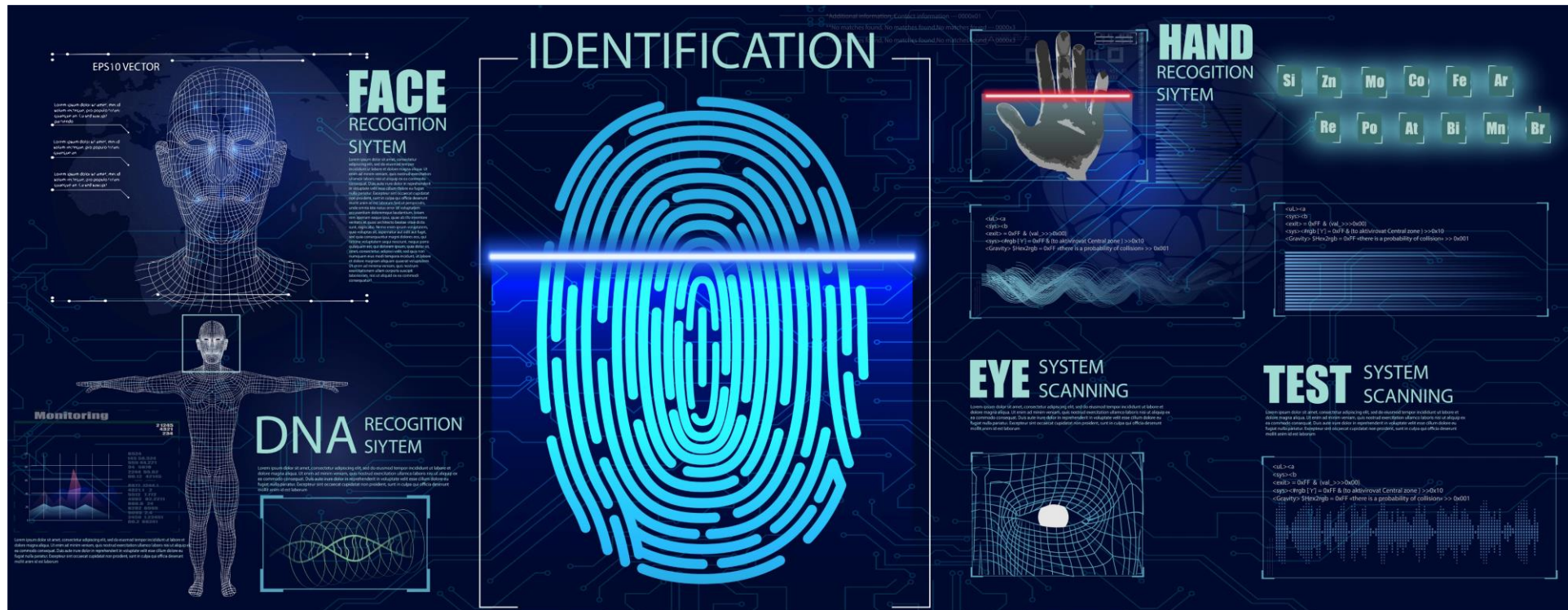
- Require intent to deceive or knowledge that a representation is false.
- Did contractor reasonably or actually rely on the representation?
- Treble or punitive damages may be awarded.

Tips to Try to Avoid These Claims

- Limit Projections of Estimated Revenue for Contractors
- Examine Recruiting and Orientation Materials for Potential Promises
- Consider Risks of Pursuing Drivers for Amounts Owed
- Document Why Drivers Sign Up With You
- Audit Practices and Compare to Program or Contract Language

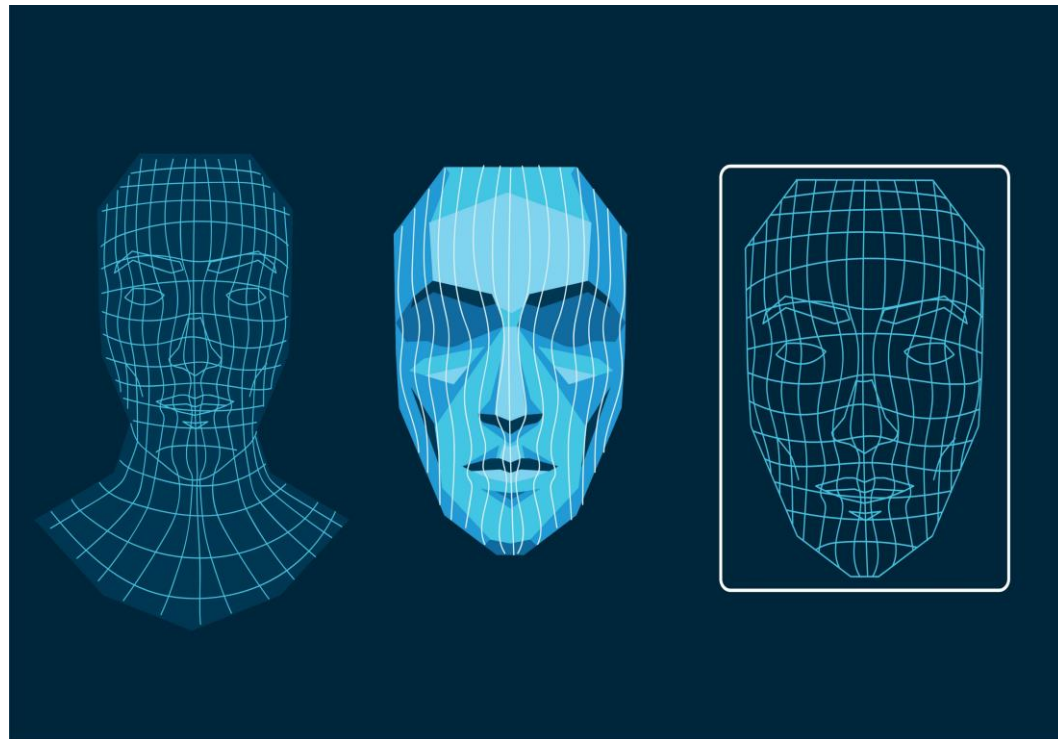
Biometric Data Privacy and Class Actions

What are biometrics?



Illinois' Biometric Information Privacy Act

- Broad statutory definition, includes:
 - Retina or iris scans
 - Fingerprints
 - Voiceprints
 - Scans of hand or face geometry



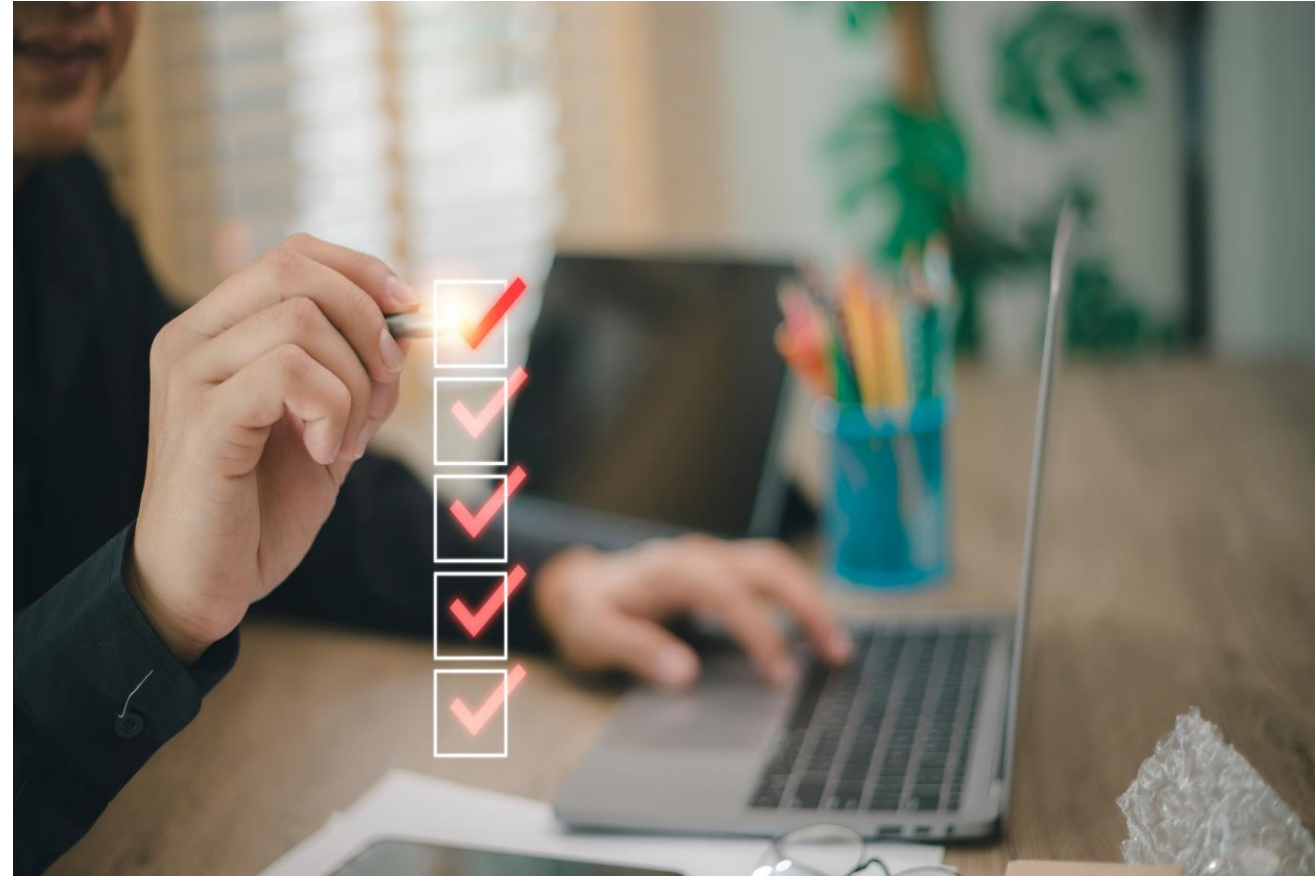
Broad Statutory Definition = Broad Application to Operations

- Timekeeping
- Security gates and other secured access points
- Inward facing dash cams
- Voice-enabled assistants



BIPA's Requirements

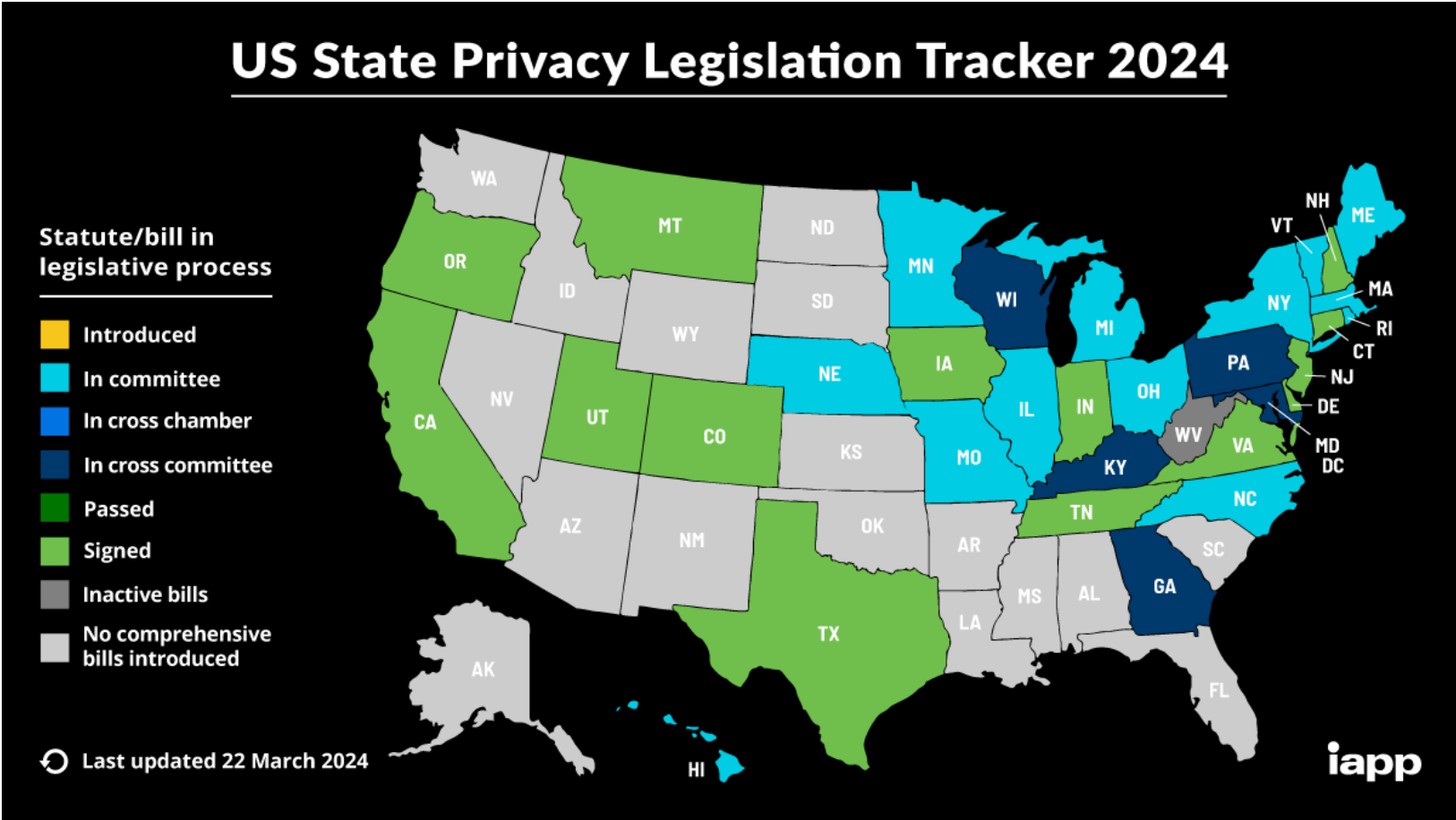
- Publicly available policy addressing retention and destruction
- Informed written consent before collection
- Destruction of information within statutory timelines
- Reasonable precautions to protect data



Statutory Penalties and Case-Law Developments: A Perfect Storm

- \$1,000 / \$5,000 per violation, regardless of actual harm
- Illinois Supreme Court decisions expanding exposure:
 - *Cothron v. White Castle Systems, Inc.* → One scan = one violation
 - *Tims v. Black Horse Carriers* → 5-year limitations period
- Fee shifting for attorneys' fees and experts' fees

Other State Consumer Privacy Acts



SO WHAT?

- Review data collection and retention practices
- Update biometric and data privacy policies
- Ensure cybersecurity measures are in place to safeguard data
- Get informed consent
- Consider preemptive releases and contractual remedies

Washington Wage Transparency Law

- Effective January 1, 2023, Washington state requires all job postings to disclose top and bottom wage range and general description of benefits
- It is not sufficient to use language like, “earn up to”
- Failure to include information in posting allows every *applicant and employee* to sue for \$5,000 in statutory damages



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